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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 28.

PETE DI GIOVANNI AND MARY DI GIOVANNI,
PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

PETITIONERS' STATEMENT, SPECIFICATION OF ERRORS AND ARGUMENT.

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PETE DI GIOVANNI AND MARY DI GIOVANNI, PETITIONERS,

VS.

CAMDEN FIRE INSURANCE ASSOCIATION, A CORPORATION, RESPONDENT.

I.

OPINIONS REPORTED.

The date of the judgment in the trial court is March 28, 1934. (Rec. p. 6.) The opinion of the circuit court of appeals was rendered February 14, 1935 (Rec. p. 12), and judgment entered thereon February 18, 1935. (Rec. p. 18.) Petition for rehearing was filed March 14, 1935 (Rec. p. 20), and denied March 18, 1935. (Rec. p. 23.) The opinion of the district court is unreported but appears at pages 10 to 12 of the record. The opinion of the United States Circuit Court of Appeals for the

Eighth Circuit is reported as *Camden Fire Insurance Association* v. *Di Giovanni*, 75 F. (2d) 808.

II.

JURISDICTION.

Application was made to this court for writ of certiorari under Rule 38 and 43 Stat. 938 (Title 28, Sec. 347, U. S. C. A.) and was the proper remedy.

Ex parte Lau Ow Bew, 141 U. S. 583.

Writ of certiorari was granted May 20, 1935. (Rec. p. 24.)

Di Giovanni v. *Camden Fire Ins. Ass'n*, ... U. S. ...., 55 S. Ct. 834.

III.

STATEMENT OF THE CASE.

The respondent, Camden Fire Insurance Association, issued two fire insurance policies on May 15, 1933, as follows: One for $3,000.00, naming the petitioners, Pete Di Giovanni and Mary Di Giovanni, as the insured, covering a two-story brick building in Kansas City, Missouri, and the other for $1,500.00, concededly issued to Pete Di Giovanni alone, covering the personal property or contents in said building in Kansas City, Missouri. (Rec. pp. 1, 2.)

On April 5, 1933, fire insurance on said building had been procured from the Old Colony Insurance Company in the sum of $5,000.00, and on May 13, 1933, from St. Louis Fire & Marine Insurance Company in the sum of

$2,500.00, and on May 13, 1933, from Eureka Security Fire & Marine Insurance Company in the amount of $2,500.00, and on May 26, 1933, in the sum of $2,000.00 in the Eureka Security Fire & Marine Insurance Company. This made a total of $15,000.00 fire insurance on the building. (Rec. p. 2.)

On April 5, 1933, fire insurance on the contents of the building in the sum of $1,000.00 had been procured from Eureka Security Fire & Marine Insurance Company, and on April 5, 1933, in the sum of $3,200.00 in the Old Colony Insurance Company. (Rec. p. 2.) This made a total of $5,700.00 fire insurance on the contents of the building.

On June 13, 1933, a fire occurred in said building, damaging the building and the contents. (Rec. pp. 2, 3.)

On December 21, 1933, the respondent, Camden Fire Insurance Association (as complainant), filed its bill of complaint (Rec. pp. 1 to 5) in the United States District Court, Western District of Missouri, against petitioners, Pete Di Giovanni and Mary Di Giovanni (as defendants), alleging that it was a New Jersey corporation; that defendants were citizens and residents of Missouri, and that the matter in controversy, exclusive of interest and costs, exceeded $3,000.00. (Rec. p. 1.) The bill of complaint then alleged the issuance and delivery of the $3,000.00 policy and the $1,500.00 policy aforementioned, stating, as to each of said policies, "a copy of which policy is filed herewith, made a part hereof, and marked Exhibit 'A'" ("B"). (Rec. pp. 1, 2.) The bill of complaint further alleged the issuance of the other policies

by the other companies above detailed, and the occurrence of said fire. (Rec. pp. 2, 3.) Then it alleges that the policies were procured from different agencies and that complainant had no knowledge of the issuance of the policies other than those issued by itself until after the fire. (Rec. p. 3.)

The bill of complaint proceeds to allege that all of the policies were procured by defendants as a part of a general scheme and plan to defraud the complainant and the other insurance companies; that in furtherance of said plan the defendants caused the property to be set fire; that the defendants procured insurance far in excess of the value of the building and its contents from different agencies, as a part of said general plan and scheme to defraud, and in order that they might set fire to the property and collect an exorbitant price for the building and its contents; that the defendants represented to complainant and certain of the other companies named that they would not procure in excess of $5,000.00 insurance on the building and $3,200.00 insurance on the contents; that the procurement by defendants of the aforesaid policies from different agencies was done to mislead complainant and the other insurance companies named, and as a part of the general scheme and plan of defendants to burn their property and collect a large sum of money; that immediately following the fire complainant ascertained said facts and denied liability upon the policies and tendered to defendants the amount of premiums paid by defendants for the policies, with legal interest thereon. (Rec. p. 3.)

The bill of complaint further makes the following allegation: "Complainant alleges that the said building was of a value not to exceed six thousand ($6,000.00) dollars." (Rec. p. 3.)

It also alleges that defendants have filed proofs of loss against all of the companies claiming a total loss "although said loss was not total," and that defendants have threatened to sue complainant upon the two policies issued by complainant as therein set forth, to recover the face amount of said policies. (Rec. p. 3.)

The bill then alleges that it is the intention of defendants to use the two said policies of fire insurance issued by complainant as a means of consummating the said fraudulent purpose, scheme and plan "and, unless restrained by Your Honorable Court, will institute two actions at law against complainant on said policies of fire insurance in an effort to consummate said fraud." (Rec. p. 4.)

The bill of complaint further alleges that the title to the real property stands in the name of defendants, Pete Di Giovanni and Mary Di Giovanni, husband and wife, as an estate by the entirety. (Rec. p. 4.) It does not state how the title to the personalty stood, but the policy and the opinion of the district court and the opinion of the circuit court of appeals, show the personalty was insured in the name of Pete Di Giovanni alone. (Rec. pp. 10, 13.)

The bill charges that "complainant has no plain, complete and adequate remedy at law, in that in an action at law, complainant would have the burden of

establishing that both respondents participated in the matters and things complained of herein." (Rec. p. 4.)

On January 10, 1934, petitioners filed a special motion to dismiss respondent's bill of complaint on the grounds that the court had no jurisdiction and that the bill does not state facts sufficient to constitute a cause of action in equity against the defendants, either jointly or severally, and that it appeared by the plaintiff's bill that it was not entitled to the relief prayed for or any relief. (Rec. p. 5.)

On March 20, 1934, the district court sustained the special motion to dismiss (Rec. p. 6), filing a memorandum opinion setting forth the reasons for sustaining said motion, to-wit, that the matter in controversy did not exceed $3,000.00 for that the policy on the building only amounted to exactly $3,000.00, and that the policy on the personalty only amounted to $1,500.00, and that the personalty policy ran to Pete Di Giovanni alone, whereas the building policy ran to both defendants. The court ruled that the two policies could not be joined because the parties therein were not the same, and that the two policies were separate and distinct contracts, requiring different measures of proof and recovery. (Rec. pp. 10, 11, 12.)

Upon appeal to the United States Circuit Court of Appeals for the Eighth Circuit, the decree of the district court was reversed February 14, 1935, order entered February 18, 1935. (Rec. pp. 12, 18.) The circuit court of appeals handed down an opinion (Rec. pp. 12 to 18) in which it ruled as follows (Rec. pp. 18-19):

"So, in the instant case, plaintiff is seeking to cancel these policies on which, should the defendants successfully maintain actions at law, they will recover $4,500.00, and in the circumstances of this case, the allegations of the bill of complaint being admitted, we think that is the amount in dispute and in controversy between the parties." (Rec. p. 16.) * * * "In the first place, in this case there is a charge of conspiracy, and there are at least two of these policies, so that it would require at least two actions at law and materially increase plaintiff's expenditures in litigation, whereas, the matter, if cognizable in equity, can be disposed of in one suit."

"But there is still a further answer to this contention. The adequate remedy at law which will prevent the maintenance of a suit in equity in the federal court is a remedy at law available in the federal court. (Citing cases.)" (Rec. p. 17.)

"Considered as law actions the claims of the defendants are separate, and the amount in controversy cannot be aggregated, so that the plaintiff can secure no remedy at law in the federal trial court, nor, indeed, would an appeal lie from the ultimate decision of the State Supreme Court to the Supreme Court of the United States, because there is no federal question involved, and the parties are private parties." (Rec. p. 17.)

"Plaintiff being free to seek its remedy in the federal court, has a right to insist that the remedy at law which will preclude its right to maintain this suit in equity shall be a remedy in the federal court." (Rec. pp. 17, 18.)

On March 14, 1935, the petitioners filed in the circuit court of appeals a petition for rehearing, and, also, their motion to complete the record, and their suggestions in support thereof. (Rec. pp. 20, 21, 22, 23, 19, 20.) The said motion was denied and the said

petition for rehearing was overruled on March 18, 1935. (Rec. p. 23.)

In the motion to complete the record petitioners moved the court to remit the transcript of the record to the district court below, authorizing and directing said district court to cause to be incorporated therein by way of supplemental record or otherwise, the two insurance policies issued by the respondent and referred to in its original bill of complaint and by reference incorporated in said bill as a part thereof. As reasons for the motion, petitioners stated that said policies or exhibits had become material and important in the determination of the appeal, particularly those provisions which provided that other insurance might be carried on the property, *and that the appellant insurance company should be liable only for its proportionate part of the entire loss,* and that the transcript of record as then filed in said circuit court of appeals failed to include said Exhibits "A" and "B" (the insurance policies) referred to in its bill. (Rec. p. 19.)

The precise points involved are these:

1. If the real subject matter of a bill in equity is cancellation of a nonnegotiable instrument and to prevent filing of a threatened suit or suits at law thereon *in a state court,* which suits would not be removable to a federal court, and the facts stated in the bill in equity would constitute a complete defense at law in said suit or suits in the state court, is an equity suit maintainable in the federal court on the ground that there is no adequate remedy at law in the federal court?

2. Is there a multiplicity of suits involved where the judgment in either of the two threatened suits would be *res judicata* and preclude recovery in the other suit, neither of said threatened suits having been filed at the time the bill in equity was filed?

3. Can an insurance company by charging a conspiracy to defraud, tie together two claims arising under two separate contracts of insurance, one covering real property and the other personal property, aggregating the amounts of the two claims so as to make the required amount for federal jurisdiction?

4. Where the face amount of the policies exceeds $3,000.00 but the bill of complaint on its face shows that the actual loss and liability is less than $3,000.00, is the jurisdictional amount of a federal court involved?

IV.

SPECIFICATION OF ERRORS.

(1)

The Circuit Court of Appeals for the Eighth Circuit erred in overruling petitioners' motion to complete the record.

(2)

The Circuit Court of Appeals for the Eighth Circuit erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

(3)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(4)

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

(5)

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

V.

BRIEF SUMMARY OF ARGUMENT.

POINT A.

The circuit court of appeals erred in overruling petitioners' motion to complete the record.

Argued under Point D.

POINT B.

The circuit court of appeals erred in ruling that complainant could maintain its bill in equity because it would have no adequate remedy at law in the federal court in the event separate suits were filed on the policies in the state court.

(a)

Bills to cancel instruments and enjoin nonremovable state court suits thereon will not lie, where the bill discloses an adequate defense assertable in the state court suits. This is the spirit of statutes prohibiting injunctions of state court suits, or suits in equity where there is an adequate remedy at law, and safeguards of the right to jury trial. To hold otherwise will render innumerable state court suits convertible into federal equitable suits for cancellation. 36 Stat. 1162, 1163, 7th Amend. Constitution.

(b)

No bill for cancellation states a cause of action unless reasonable ground for apprehension of injury is alleged. No such ground exists where a complete defense will annihilate the suit in the only court in which it can be brought, the state court. A bill to cancel is a bill *quia timet*—"because he fears." If he has nothing to fear, he has no equitable cause of action. That is why bills to cancel matured notes, leases, and insurance policies do not lie, except under extraordinary circumstances. Story's Eq. Jur. (14th Ed.), Vol. 2, Secs. 935, 936, 948, 949, pp. 313, 316, 330; Bispham's Prin. of Eq. (9th Ed.), Secs. 474, 568, pp.

751, 852; Hogg on Eq. Princ., Sec. 45, p. 80; Tiedeman on Eq. Jur., Secs. 539, 540, pp. 632, 633; Encyc. of Pl. & Pr., Vol. 3, p. 599; *Holland* v. *Challen*, 110 U. S. 15; *Russell* v. *Clark's Exec.*, 7 Cranch. 69, l. c. 89; *Cable* v. *Ins. Co.*, 191 U. S. 288; *Butler* v. *Durham*, 2 Ga. 413; *Babcock* v. *Rieger*, 58 S. W. (2d) 722, 332 Mo. 538; *Babcock* v. *Rieger*, Case No. 16651 (K. C. App.), appendix.

(c)

This court has announced these principles in cases removable to the state courts. *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288. However, the opinions were based on general propositions and were not predicated simply on the fact that the case there considered could be filed in or removed to the law side of the federal courts. *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288; *Insurance Co.* v. *Bailey*, 13 Wall. 616; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379; *Scottish U. & N. Ins. Co.* v. *Bowland*, 196 U. S. 611; *Pioneer Pyr. Life Ins. Co.* v. *Hughey*, 76 F. (2d) 524 (C. C. A. 4); *Niagara Fire Ins. Co.* v. *Adams*, 198 F. 822 (C. C. A. 1); Contra, *Mass. Prot. Ass'n* v. *Stephenson*, 5 F. (Supp.) 586 (D. C. Ky.); Pomeroy's Eq. Jur. (4th Ed.), Vol. 5, Sec. 2107, p. 4750, Note 55.

(d)

Paragraph 16 of the First Judiciary Act, September 24, 1789, 1 Stat. 82, prohibits maintenance of a suit in equity where there is an adequate remedy at law. Paragraphs 11 and 12 deal with cases over which the state and federal courts have concurrent jurisdic-

tion, and over removable and nonremovable state court cases. The prohibition should be held applicable to all cases previously mentioned, to-wit, nonremovable as well as removable cases. It is illogical to twist the provision making certain state court cases nonremovable to the federal courts into a ground for filing a bill on the equity side of the federal court.

(e)

The decisions have noted frequent exceptions to the rule that the adequate remedy at law which precludes a federal suit in equity, must be in the federal courts. *Porter* v. *Investors Syndicate*, 286 U. S. 461; *Matthew* v. *Rogers*, 284 U. S. 521; *Graham* v. *Rd.*, 118 U. S. 161; *Phillips* v. *Negley*, 117 U. S. 665; *Boise Artesian H. & C. Water Co.* v. *Boise City*, 213 U. S. 276; *Prentis* v. *Atl. Coast Line Co.*, 211 U. S. 210. Instances of an adequate remedy at law in a nonremovable state court case simply constitute another exception.

(f)

Decisions referring to classes of cases over which equity has always exercised jurisdiction according to "established principles" (*Smyth* v. *Ames*, 169 U. S. 466) are inapplicable to a bill *quia timet*, where from the beginning equity has refused jurisdiction in the presence of an adequate remedy at law in whatever court the threatened suit is triable.

POINT C.

The Circuit Court of Appeals for the Eighth Circuit erred in holding there was equitable jurisdiction in the case at bar because of multiplicity of suits, or because of a threatened multiplicity of suits, for the reason that a judgment in favor of the complainant in either of said threatened suits would be a complete bar to recovery in the other.

(a)

This bill, measured as a bill of peace, cannot be maintained to prevent vexatious litigation, for the complainant's asserted right has never yet been established at law. *Butler* v. *Durham, supra; Babcock* v. *Rieger, supra; Holland* v. *Challen, supra; Pac. Mut. Life Ins. Co.* v. *Parker,* 71 F. (2d) 872, 876 (C. C. A. 4); 21 Corpus Juris, Sec. 50, pp. 76, 77, 78. There is nothing in the bill disclosing anything except that petitioners seek an adjudication at law of their right to collect the insurance.

(b)

There is no multiplicity of suits involved, for the suit on the building policy would be *res judicata* of the suit on the personalty. Even if the personalty suit is tried first, it will be *res judicata* in the suit on the building, for if petitioner, Pete Di Giovanni, loses in the personalty suit, he and his wife, as tenants by the entirety, cannot recover in the suit on the realty. *Stifel's Union Brewing Co.* v. *Saxy,* 273 Mo. 159, 201 S. W. 67; *Fulbright* v. *Phoenix Ins. Co.,* 329 Mo. 207, 44 S. W. (2d) 115; *Boise Artesian H. & C.*

Water Co. v. *Boise City*, 213 U. S. 276; *Hipp* v. *Babin*, 19 Howard 271, 279; *Ins. Co.* v. *Bailey, supra; Niagara Fire Ins. Co.* v. *Adams, supra; Pioneer Pyr. Life Ins. Co.* v. *Hughey, supra; N. Y. Life Ins. Co.* v. *Marshall*, 21 F. (2d) 172, affd. 23 F. (2d) 225 (C. C. A. 5); *Pac. Mut. Life Ins. Co.* v. *Parker, supra.*

POINT D.

The Circuit Court of Appeals for the Eighth Circuit erred in holding that the jurisdictional amount of $3,000.00 was involved, in view of the fact that the actual liability of complainant under both policies would only total $2,700.00.

(a)

Under these policies, complainant was only liable (with other insurers) for its proportion ($2,700.00) of the total loss, which it alleged was $6,000.00. The record should have been completed, on motion, to show the policy provisions to this effect. *Grand Chute* v. *Winegar*, 15 Wall. (U. S.) 373, 376; Federal Equity Rule 76; *Fairbanks, Morse & Co. et al.* v. *American Valve & Meter Co. et al.*, 276 U. S. 305; *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372; *Hobbs* v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2); Rule 23 of 8th Circuit Court of Appeals; Rule 13, Par. 9 of this court. Fed. Eq. Rule 76. Hence, the jurisdictional amount was not involved. The amount of the loss is the amount involved. *N. Y. Life Ins. Co.* v. *Johnson*, 255 F. 958 (C. C. A. 8); *Schacker* v. *Ins. Co.*, 93 U. S. 241; *Ex parte Phoenix Ins. Co.*, 117 U. S. 367; *Mechanics Ins. Co.* v. *Dist. Co.*, 173 F. 888 (C. C. A.

8); *Wisconsin Central Ry. Co.* v. *Ins. Co.*, 123 F. 989 (C. C. Wisc.); *Norton* v. *Larney*, 266 U. S. 511; *Smith* v. *McCullough*, 270 U. S. 456.

(b)

The point is debatable. *Schunk* v. *Moline, Milburn & Stoddard Co.*, 147 U. S. 500; *In re Reisenberg*, 208 U. S. 90. The question is not the amount in dispute in the threatened suits on the policies, but the amount involved in a bill to cancel documents, where the bill in effect concedes that complainant will lose less than $3,000.00, if the alleged ground of cancellation is not sustained.

POINT E.

The circuit court of appeals erred in holding that the two claims arising under the two policies of insurance issued by it could be tied together by the charge of concerted design and action to defraud, for the purpose of ascertaining the amount involved for jurisdictional purposes.

(a)

The general rule is separate claims cannot be tied together. *McDaniel* v. *Traylor*, 196 U. S. 415, involved a conspiracy to fasten John Evans' debts onto Hiram Evans estate. Of course, the amount involved was the total of John Evans' debts. *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, involved a conspiracy to ruin complainant by numerous meritless suits. The singleness of the object tied the claims together. The two policies

here were issued simultaneously, covering property in the same location, subject to destruction by the same fire, and named Pete Di Giovanni one of the insured in each policy. Under such circumstances, the insurer's agreement to separate policies is equivalent to an agreement that ordinary defenses, whether in procurement or otherwise, should be dealt with separately, too.

VI.

ARGUMENT.

POINT A.

(Specification 1.)

The Circuit Court of Appeals Erred in Overruling Petitioners' Motion to Complete the Record.

The argument under this point logically falls in with the argument under Point D and will be found there.

POINT B.

(Specification 2.)

The Circuit Court of Appeals Erred in Ruling That Complainant Could Maintain Its Bill in Equity Because It Would Have No Adequate Remedy at Law in the Federal Court in the Event Separate Suits Were Filed on the Policies in the State Court.

(a)

The complainant's bill alleges that two suits were threatened, namely, one on the $3,000.00 policy on the building, and the other on the $1,500.00 policy on the personalty. Neither of these suits would be removable to the federal court. Although the alleged fraud set up in the complainant's bill of complaint would constitute a complete defense *in the state court*, yet the circuit court of appeals held that fact immaterial for the reason that complainant had no adequate remedy at law or defense *assertable in the federal court*.

If this is so, then every state court suit for small installments due on policies whose face amount exceeds $3,000.00 (*Wright* v. *Ins. Co.*, 19 F. (2d) 117 (C. C. A. 5) 276 U. S. 602) and every case where two policies combined issued by the same company together exceed $3,000.00 may be converted into a federal equity suit for cancellation, depriving the insured of a jury trial.

The rule that the complainant must have an adequate remedy at law *in the federal court* has no application to cases where the active subject matter of the bill (really a bill of peace or *quia timet*) and the "great object" (91 U. S. 254, 257) thereof are to restrain prosecution of threatened suits at law, themselves cognizable only by state courts. Certainly to so apply the rule would run counter to the spirit and public policy which underlie, 36 Stat. 1162, 28 U. S. C. A., Sec. 379, which prohibits federal courts from enjoining proceedings already pending in state courts, and 36 Stat. 1163, 28 U. S. C. A., Sec. 384, which denies equity jurisdiction to federal courts when there is an adequate remedy at law, and to the Seventh Amendment to the Constitution which preserves in federal courts the right to trial by jury in cases involving more than $20.00.

(b)

If one sues in equity to enjoin prosecution of threatened suits at law in a state court, surely, to state a cause of action in equity, he must demonstrate in his bill that there is a real cause for apprehension of injury on his part. In considering whether or not the alleged danger is actual or whether it is only illusory, the

decisive test must be whether the defense is assertable *in the very forum where the danger is alleged to exist.* If such a threatened suit or suits could not be removed to the federal court, then clearly the only question is whether the defense is assertable in the state court.

If a wild animal is confined to a certain cage, no one has the right to complain that this animal is dangerous, merely by asserting that he cannot defend himself against it or slay it at some other place, where it can never be. If the monster that the complainant seeks to decapitate by its bill can only rear its head in the state court, then in ascertaining whether or not it really is a monster or whether it is merely a myth (so far as danger is concerned) it is beside the point whether or not the sword that can render it harmless can be thrust in the federal court, where this monster can never appear. The question is whether a confined apparition can be dispelled in the only place where it is claimed it will appear or ever can appear, not whether it can be destroyed in a place where no one even claims it can ever possibly appear to frighten or injure the complainant. If one files a bill to abate a nuisance in Washington, D. C., in determining whether or not he has stated a cause of action, the only question is whether the alleged nuisance really constitutes a nuisance in the place that it actually is and will remain, not whether it would be a nuisance if in some other place where it never can be.

Where the subject of a bill for equitable relief is peculiarly a suit or suits at law which can only be filed in a

state court, then no possible injury can flow therefrom, if a complete defense can be asserted in that state court, and it does not state a cause of action for equitable interference. *Strictly speaking, the point involved is not whether there is an adequate remedy at law or not. The proposition really is that no cause of action is stated in equity because no real danger or injury necessitating equitable interposition is disclosed under the pleaded circumstances.* The alleged poison is disclosed to carry along with a complete antidote neutralizing it wherever the poison may appear or its use be attempted.

It has never been supposed that the mere fact that one wrongfully held an instrument entitled another to maintain a bill for its cancellation. The entire doctrine of cancellation is referable to the original equitable bill *quia timet*—"because he fears," a protective, preventive writ, never issued unless demanded by special circumstances constituting reasonable grounds to apprehend substantial, irretrievable injury. Story's Eq. Jur. (14th Ed.), Vol. 2, Secs. 935, 936, 948, 949, pp. 313, 316, 330; Bispham's Prin. of Eq. (9th Ed.), Secs. 474, 568, pp. 751, 852; Hogg on Eq. Prin., Sec. 45, p. 80; Tiedeman on Eq. Jur., Secs. 539, 540, pp. 632, 633; Encyc. of Pl. & Pr., Vol. 3, p. 599; *Holland* v. *Challen*, 110 U. S. 15. The bill cannot be misused to gain a strategic advantage. *Russell* v. *Clark's Exec.*, 7 Cranch. 69, 89; *Cable* v. *Ins. Co.*, 191 U. S. 288. Thus, such a bill will not lie to cancel matured notes, leases or other nonnegotiable contracts, the actual establishment of which need never be feared. *Butler* v. *Durham*, 2 Ga. 413; *Babcock* v. *Rieger*, 58 S. W. (2d) 722, 332 Mo. 538; *Babcock* v. *Rieger*, Case No. 16651

(K. C. App.), see appendix; cases cited under (c) *post*. In insurance cases where loss has occurred the policy as such is unimportant, for it has become a "mere legal demand" for money, triable in the usual manner. *Continental Cas. Co.* v. *Yerxa*, 16 F. (2d) 473, and cases cited (D. C. Mass.).

(c)

This court has ruled that where the threatened suits at law would be removable to the federal court, then no bill in equity will lie.

Cable v. *United States Life Ins. Co.*, 191 U. S. 288. However, the decisions seem to rest on the fundamental principles adverted to above, and not on the possibility there present of the federal court acquiring the threatened suits at law.

Insurance Co. v. *Bailey*, 13 Wall. 616.
Grand Chute v. *Winegar*, 15 Wall. 373.
Enelow v. *N. Y. Life Ins. Co.*, 293 U. S. 379.
Scottish U. & N. Ins. Co. v. *Bowland*, 196 U. S. 611.
Pioneer Pyr. Life Ins. Co. v. *Hughey*, 76 F. (2d) 524 (C. C. A. 4).
Niagara Fire Ins. Co. v. *Adams*, 198 F. 822 (C. C. A. 1).
Contra, *Mass. Prot. Ass'n* v. *Stephenson*, 5 F. (Supp.) 586 (D. C. Ky.).

The writer of the notes to the Fourth Edition of Pomeroy's Equity Jurisprudence, Vol. 5, Sec. 2107, p. 4750, Note 55, has this to say about it:

"Some federal courts have found support for assuming jurisdiction on the extraordinary ground

that the action to which complainant would be called upon to make defense might be an action in a state court. *Mutual Life Ins. Co.* v. *Pearson*, 114 Fed. 395, 397; *United States L. Ins. Co.* v. *Cable*, 98 Fed. 761, 763, 39 C. C. A. 264; *Mutual Life Ins. Co.* v. *Blair*, 130 Fed. 971. These cases have been practically overruled, however, in the late case of *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288, 48 L. Ed. 232, 24 S. Ct. 74."

No doubt the reference in the above quotation was to the following language of this court in the opinion in the *Cable Case* (l. c. 78):

> "Where a plaintiff in a state court which has jurisdiction over the subject matter brings the defendant properly within such jurisdiction, he is entitled to a trial of his cause in that court, unless the case be removed to a federal court upon some constitutional ground. If that ground exists, the removal can be made, but if it do not, equitable jurisdiction does not accrue to a federal court because it is thought the law as administered by that court is more favorable to the party seeking its aid."
> *Cable* v. *U. S. Life Ins. Co.*, 191 U. S. 288.

(d).

Sec. 16 of the Act of September 24, 1789, 1 Stat. 82 (now with unimportant changes Sec. 267 of the Judicial Code, 36 Stat. 1163), is as follows:

> "And be it further enacted, that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

In the same statute Congress specifically defined the cases in which the state courts and the federal courts

had concurrent jurisdiction. It also dealt in terms with cases removable to the federal courts and cases not removable from the state courts. (See Appendix.) It is inconceivable that Congress in denying federal jurisdiction over nonremovable state court cases, intended that very prohibition in and of itself to constitute a ground of federal equitable jurisdiction over substantially the same controversy. It is more reasonable to construe the prohibition of the statute quoted, to be coextensive with the cases expressly mentioned in the same Act, to-wit, nonremovable, as well as removable, cases.

(e)

This court has noted several exceptions to federal equitable jurisdiction, on the ground that there were adequate remedies in the state law courts; for example, revenue enforcement cases, rate enforcement cases, state court judgments, and habeas corpus proceedings. *Porter* v. *Investors Syndicate*, 286 U. S. 461; *Matthew* v. *Rogers*, 284 U. S. 521; *Graham* v. *Rd.*, 118 U. S. 161; *Phillips* v. *Negley*, 117 U. S. 665; *Boise Artesian H. & C. Water Co.* v. *Boise City*, 213 U. S. 276; *Prentis* v. *Atl. Coast Line Co.*, 211 U. S. 210. The precise question having arisen, it seems appropriate to distinctly include among the exceptions, bills for cancellation, where there are no exceptional circumstances present.

(f)

Decisions in classes of cases always cognizable in equity according to "the established principles and rules of equity" (*Smyth* v. *Ames*, 169 U. S. 466), up-

holding the right of the complainant to choose the federal court as his forum, have no application to the bill *quia timet* involved here, falling within a class of cases over which equity irrespective of forum under "established principles" has consistently refused to exercise jurisdiction.

POINT C.

(Specification 5.)

The Circuit Court of Appeals for the Eighth Circuit Erred in Holding There Was Equitable Jurisdiction in the Case at Bar Because of Multiplicity of Suits, or Because of a Threatened Multiplicity of Suits, for the Reason That a Judgment in Favor of the Complainant in Either of Said Threatened Suits Would Be a Complete Bar to Recovery in the Other.

(a)

This bill cannot be sustained on the familiar ground of preventing vexatious or other misuse of the instruments, such as to embarrass, harass, irritate or annoy, using the terms in a substantial sense; for there is nothing here to indicate that petitioners seek anything more than an adjudication of their right to collect for their losses, or that once the common issue is determined, they will groundlessly repeat, protract or renew the litigation. To maintain a bill of peace, it is essential that complainant's right be first established at law. *Butler* v. *Durham, supra; Babcock* v. *Rieger, supra; Holland* v. *Challen, supra; Pac. Mut. Life Ins. Co.* v. *Parker*, 71 F. (2d) 872, 876 (C. C. A. 4); 21 Corpus Juris, Sec. 50, pp. 76, 77, 78.

(b)

But in no event can there be a multiplicity of suits here. It will be observed that Pete Di Giovanni must be one of the plaintiffs in each suit. If the suit on the building policy, in which both Pete Di Giovanni and his wife are plaintiffs, were tried first, then the judgment in that suit would be *res judicata* against Pete Di Giovanni, so that there would be no danger to apprehend from the second suit, and there would be no multiplicity of suits or no further suit to try, as a matter of fact.

There is no presumption that the case on the personal property policy will be tried before the case involving the building policy; yet it must be assumed, in order to justify a bill in equity, that the case to be brought by the husband alone on the personalty policy will be tried first. Under the facts pleaded in this bill both suits would be filed at the same time and tried at the same time. Certainly until it is alleged and actually appears that the suit of the husband alone is going to be tried first, there is no reason to surmise that that will be done. The defendant will have the same control over the cases in the state court as the plaintiffs. *Cable v. Ins. Co.*, 191 U. S. 309. No doubt, on suggestion, the state court would direct the case in which both petitioners are plaintiffs to be tried first. It will be time enough to file a bill in equity to prevent a multiplicity of suits when it actually appears that there will be a multiplicity of suits, not merely that there is a remote theoretical possibility of same.

(c)

But let us suppose that Pete Di Giovanni's suit on the policy covering the personalty is tried first and he is defeated. If he is there defeated, the suit on the policy covering the building cannot be maintained. For that suit must be maintained by *husband and wife*, as tenants by the entirety. Neither can recover singly.

But as plaintiff, Pete Di Giovanni, is barred from recovering, the liability as to him being *res judicata*, there can be no joint recovery. It is the risk the wife took in accepting title as a tenant by the entirety. *Stifel's Union Brewing Co.* v. *Saxy*, 273 Mo. 159, 201 S. W. 67; *Fulbright* v. *Phoenix Ins. Co.*, 329 Mo. 207, 44 S. W. (2d) 115.

Boise Artesian H. & C. Water Co. v. *Boise City*, 213 U. S. 276.
Hipp v. *Babin*, 19 Howard 271, 279.
Ins. Co. v. *Bailey*, *supra*.
Niagara Fire Ins. Co. v. *Adams*, *supra*.
Pioneer Pyr. Life Ins. Co. v. *Hughey*, *supra*.
N. Y. Life Ins. Co. v. *Marshall*, 21 F. (2d) 172, af'd 23 F. (2d) 225 (C. C. A. 5).
Pac. Mut. Life Ins. Co. v. *Parker*, *supra*.

POINT D.

(Specification 3.)

The Circuit Court of Appeals for the Eighth Circuit Erred in Holding That the Jurisdictional Amount of $3,000.00 Was Involved in View of the Fact That the Actual Liability of Complainant under Both Policies Would Only Total $2,700.00.

(Point A, involving the motion to complete the record by showing the policies sued on, is argued under this heading, also.)

(a)

The bill alleges the following policies of fire insurance on the building:

$ 3000.00	Camden Fire Ins. Association	5-15-33
2000.00	Eureka Security, etc.	5-26-33
2500.00	Eureka Security, etc.	5-13-33
2500.00	St. Louis Fire & Marine Ins. Co.	5-13-33
5000.00	Old Colony	4- 5-33
$15000.00		

Complainants' insurance policy of $3,000.00 on the building was one-fifth of the total fire insurance on the building. Complainant alleged in the bill that the building was of a value not to exceed $6,000.00. On motion to dismiss, this allegation must be taken as true.

Grand Chute v. *Winegar*, 15 Wall. (U. S.) 373, 376.

One-fifth of the total loss of $6,000.00 is $1,200.00. Adding to this $1,200.00, the full amount of the policy on the personal property, to-wit, $1,500.00, the total loss of respondent under its own bill in equity cannot possibly exceed $2,700.00. Therefore, the jurisdictional amount is not involved.

In order to show that respondent's policies referred to in its bill in equity each contained a provision that the insurer was only to be liable for such proportion of any loss as the amount of the policy bore to the whole amount of fire insurance applying, whether such other insurance contained a similar clause or not, peti-

tioners filed their motion in the United States Circuit Court of Appeals for completion of the record, filing the original policies with the clerk of said court. If the point we are making is meritorious, then the circuit court of appeals should have sustained said motion.

Federal Equity Rule 76.

Fairbanks, Morse & Co. et al. v. *American Valve & Meter Co. et al.*, 276 U. S. 305.

Barber Asphalt Paving Co. v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372.

Hobbs v. *National Bank of Commerce of Kansas City*, 93 F. 615 (C. C. A. 2).

Rule 23 of 8th Circuit Court of Appeals.

Rule 13, Par. 9 of this court.

At our request the original policies have been transmitted to the clerk of this court. We quote from said policies as follows:

"3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance applying whether such other insurance contains a similar clause or not."

Policy No. 910156.

"3. It is also a condition of this policy that if there be other fire insurance upon the property covered, this Company shall be liable only for such proportion of any direct loss or damage caused by fire or by lightning as the amount of this policy bears to the whole amount of fire insurance

applying whether such other insurance contains a similar clause or not."

Policy No. 910254.

It is not the amount claimed in a prayer for relief, or which complainant says in its pleading is involved, that determines the jurisdiction of the federal court if the "unmistakable fact and legal certainty be" that a lesser amount is involved. The amount of loss is the amount involved, after fire. *N. Y. Life Ins. Co.* v. *Johnson*, 255 F. 958 (C. C. A. 8); *Schacker* v. *Ins. Co.*, 93 U. S. 241. Nor does the amount of liability on the policies issued by the other insurers increase the amount involved here. *Ex parte Phoenix Ins. Co.*, 117 U. S. 367; *Mechanics Ins. Co.* v. *Dist. Co.*, 173 F. 888 (C. C. A. 8); *Wisconsin Central Ry. Co.* v. *Ins. Co.*, 123 F. 989 (C. C. Wisc.).

Furthermore, the bill of complaint affirmatively alleged that the building was not a total loss Since there is no allegation of the amount of the loss to the building, it is impossible to ascertain how much damage there was thereto. It might only have been nominal damage. Consequently, the jurisdiction of the court has not been made affirmatively and distinctly to appear. *Norton* v. *Larney*, 266 U. S. 511; *Smith* v. *McCullough*, 270 U. S. 456.

(b)

We frankly admit that the point we are here making is debatable. This court has held that in an ordinary action the amount claimed is the amount in

dispute. *Schunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500; *In re Reisenberg*, 208 U. S. 90.

The question here is not what amount would be involved in the threatened suits at law on the policies. The question here is what amount is involved in a suit to cancel instruments, where the bill necessarily concedes that if the asserted ground of cancellation is not sustained the complainant will nevertheless suffer a loss of only $2,700.00.

POINT E.

(Specification 4.)

The Circuit Court of Appeals Erred in Holding That the Two Claims Arising under the Two Policies of Insurance Issued by It Could Be Tied Together by the Charge of Concerted Design and Action to Defraud, for the Purpose of Ascertaining the Amount Involved for Jurisdictional Purposes.

(a)

Concededly, the general rule is that separate claims cannot be tied together. The circuit court of appeals thought that the instant case fell within the rulings of two exceptional decisions of this court.

The first of the cases was *McDaniel* v. *Traylor*, 196 U. S. 415. This case involved a situation where conspirator creditors in league with the administrator of an estate had fraudulently proved and procured to be allowed in probate court illegal claims. The essence of the conspiracy was to fix on the estate of

Hiram Evans, deceased, the debts of John Evans, which the defendants, except the administrator, held. The single object, to-wit, to fasten John Evans' liabilities on Hiram Evans' estate, schemed at by all of the defendants, was quite properly measured as an entirety, and the amount involved was the total amount of John Evans' debts. This would have been true whether John Evans' debts were all held by one claimant or by many claimants.

In *Sovereign Camp* v. *O'Neill*, 266 U. S. 292, the alleged object of the conspirators was to ruin the defendant by numerous meritless suits, the defense of which entailed enormous expense. The real object was not to collect the various separate amounts sued for in said meritless suits. The main and controlling objective of these numerous suits being simply to ruin the defendant corporation, and that being the common object of the conspiracy (the suits being merely the device or overt acts resorted to in order to accomplish the main object), this court ruled that the singleness of the main object tied the incidental claims together into one.

These two cases properly analyzed bear no analogy to the case at bar. In the case at bar there is no single objective which ties these claims together. Here are involved just two insurance policies and two proposed suits at law, each to collect on one of the pol-

icies, with no further underlying objective. There is nothing exceptional in the circumstances of this case to tie the claims together, except that they had a common origin. It could just as well be urged that whenever a man, even in the best of faith, takes out two fire policies on the same property, that his object is to collect just a single compensation in the event of a fire, and that, consequently, the amount involved is that single sum. The case at bar falls within the rule often applied that common origin does not tie the claims together. It does not fall within the exception that where there is a single, controlling, ulterior objective, participated in by all of the parties involved, that then the claims will be tied together.

(b)

The two policies in question here were issued simultaneously, covering property in the same location, subject to damage by the same hazard, and with one of the petitioners designated as one of the insured in each policy. Much in this situation tied the insurance together at the outset. Nevertheless the insurer voluntarily divided same into separate contracts. It should be held estopped after loss to tie them together simply for the purpose of asserting defenses thereto, whether in procurement or in application, these being defenses so usual in insurance cases as to be deemed within the contemplation of the parties when the policies were written. In neither of the above decisions was there

any original bond or connecting relation in the subject matter of the claims or between the claimants, nor was there any conduct of the complainant equivalent to an agreement that the claims should stand on separate footings for all ordinary purposes.

Respectfully submitted,

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APPENDIX.

(a)

Babcock v. *Rieger, No.* 16651.

The first opinion in this litigation was written by Commissioner Barnett for the Kansas City Court of Appeals of Jackson County, Missouri. It was never reported because the Supreme Court of Missouri on a writ of certiorari quashed the record of the Kansas City Court of Appeals on the ground that it had no jurisdiction over the appeal. (*State ex rel. Babcock* v. *Trimble et al.*, 326 Mo. 702, 32 S. W. (2d) 760.) When the Supreme Court passed on the merits of the case it sustained the conclusions reached in the unreported opinion of the Kansas City Court of Appeals. (*Babcock* v. *Rieger*, 58 S. W. (2d) 722.) For the reason that the facts are so fully set out in the reported cases, we omit same and only quote here the pertinent portions of the opinion of the Kansas City Court of Appeals, as follows:

> "Appellant contends that the court erred in trying this cause as a suit in equity upon the ground that a judgment for defendants in the action at law instituted by the plaintiff would have afforded defendants all the relief to which they were entitled. Respondent makes the following contention: 'Where an answer sets up an estoppel *in pais* entitling defendant to affirmative relief and praying such relief the case is converted into one in equity.' 'Cancellation is an exclusive remedy of equity.' 'An adequate remedy at law does not exist where, although suit is pending on an instrument, same may be dis-

continued at will by plaintiff.' 'A lease will be cancelled by a court of equity where it appears the lessor, although obligated to repair in case of fire, has failed to do so within a reasonable time, which failure has caused lessee to make other arrangements.' 'Equity will cancel an instrument which, for some cause, either legal or equitable, has become *functus officio* and liable to misuse in the hands of plaintiff.' All of these contentions are based upon language to be found in various decisions cited by the respondents; but they have all been lifted from their settings, placed in an artificial juxtaposition, and applied to an action on a cross bill which presents none of the grounds for equitable relief which existed in those cases where the language was used. No one doubts that if an equitable defense is set up in a cross bill entitling defendant to affirmative relief, coupled with a prayer for such relief, then the whole case is converted into a suit in equity, although the petition stated a cause of action at law. But a prayer for affirmative equitable relief amounts to nothing unless defendant is entitled to such relief according to the allegations of his bill. Of course, the cancellation of instruments, including the cancellation of leases, can only be had in equity; but a prayer for cancellation, like any other prayer for equitable relief, must be coupled with allegations showing a right thereto.

The contention that respondents had no adequate remedy at law because plaintiff's suit might be discontinued at will is bottomed on the citation of *Begley* v. *Mississippi Valley Trust Co.*, 252 S. W. 84. In that case the cross-bill contained all the allegations essential to a good bill of peace. The court stated that the intention of the holder of the note to institute and dismiss and reinstitute suits thereon and thereby harass the parties against whom the alleged note was asserted was not left to conjecture. The plaintiff had sued the defendants in Butler County where defendants resided. Plaintiff

then brought another suit upon the same cause of action in the City of St. Louis. Then, after defendants had filed an answer and counterclaim in Butler County and that case was set for trial, plaintiff dismissed that action. It has always been held that a court of equity will entertain a bill of peace to enjoin the vexatious or malicious institution of repeated suits on the same cause of action. 21 C. J. 76. But a bill of peace should allege that plaintiff has vexatiously instituted, dismissed, and reinstituted the same cause of action, or that plaintiff has continued to institute suits upon a cause of action which has once been adjudged against him, or has repeatedly brought a form of action wherein the judgment is not *res adjudicata*, such as ejectment, for the purpose of harassing or annoying the defendant. In the absence of such an allegation it amounts to nothing to allege that defendants are or may be harassed by further litigation. Except for the necessity of the allegation of actual oppressive litigation, together with the proof thereof, any action at law could be converted into a suit in equity at the election of the defendant.

The claim that a lease will be cancelled by a court of equity, where it appears that the lessor although obligated to make repairs after fire has failed to do so, is bottomed on the citation of *Lincoln Trust Co.* v. *Nathan*, 175 Mo. 32. In that case the lease provided that lessor should make repairs or rebuild in the event of damage by fire, but there was no express provision that the failure to perform this covenant would terminate the lease. The general common law rule is that a lessee is not relieved of the obligation to pay rent for the full term of a lease if, during the term, the leased property be destroyed by fire. The court held that in such case equity would decree a forfeiture of the lease because the covenants to pay rent and to rebuild after a fire were dependent upon each other and it would be against good conscience to permit the landlord to violate the contract on his part and still require

performance of the contract by the lessee. It is clear that that case does not support respondent's contention. In the Lincoln Trust Company case the lessee was in good conscience entitled to rescission of the lease, but that relief could not be afforded by a court of law.

In the instant case defendants allege that by reason of certain facts the lease has terminated according to the express provisions of the instrument. If that be true cancellation would be a useless thing. If respondent proved these facts he was entitled to a favorable verdict at the hands of a jury. A judgment based upon that verdict would have conclusively established defendant's claim that the lease no longer existed. Furthermore, the judgment would have been full protection against any further litigation whether instituted by the plaintiff or anyone claiming under him. Plaintiff, being the owner of the lease and of the claim for rent thereunder at the time the case was tried, could not have invested any assignee with any claim against which this judgment would not have been conclusive. *Brady* v. *Kirby et al.*, decided by this court at this term and not yet published. (Now published, 22 S. W. (2d) 52.)

The claim that the cross bill states a cause of action for equitable relief because it prays for the cancellation of the instrument is buttressed with the further suggestion that courts of equity have a concurrent jurisdiction with courts of law in matters of fraud, accident and mistake. In our opinion there was neither allegation nor evidence of any fraud in this case. Furthermore, while it is true that courts of equity have concurrent jurisdiction to grant relief on account of fraud, yet, the relief granted in equity is different from that granted at law. One who has been misled by fraud into a disadvantageous contract may recover his damages at law; but if he does so he must perform the contract, observe the obligations, and bear the burdens which the contract imposes upon him. Equity does not consider this relief to be fully adequate.

A man should not be compelled to perform a contract which has been procured by fraud. He may, therefore, elect to institute a suit in equity praying a rescission of the contract, which includes the right to pray cancellation of an instrument evidencing the contract. It is plain that such right is not involved in this case. Respondents made the defense that the contract was terminated, and for that reason no further duties were imposed on them. The only cases that have come to our attention where a court of equity has entertained jurisdiction to cancel an instrument which merely imposes upon the defendant an obligation to pay money, are cases wherein the written obligation was negotiable, and therefore, not subject to the defense which might be made against the original party as against a holder in due course, and cases where the contract provided that it should be incontestable after a certain period, and the plaintiff had an absolute right at law to defer instituting an action upon the contract until the instrument had become incontestable according to its terms. It has always been held that when a suit is filed on a note which is no longer negotiable, or upon a contract of insurance which contains no incontestable clause, or in which the incontestable clause has already become absolute by the lapse of time, that the right to defend the action at law is completely adequate. *Berryman* v. *Motor Car Ins. Co.*, 199 Mo. App. 503; *Stalter* v. *Stalter*, 151 Mo. App. 66; *Schuermann* v. *Ins. Co.*, 165 Mo. 641; *Bank of Neelyville* v. *Lee*, 193 Mo. App. 537; *West* v. *Brison*, 99 Mo. 684."

(b)

Act of September 24, 1789.

"Sec. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in

equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions hereinafter provided." (1 Stat. 78) (See 36 Stat. 1091.)

"Sec. 12. *And be it further enacted,* That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next

circuit court, to be held in the district where the suit is pending, or if in the district of Maine to the district court next to be holden thereon, or if in Kentucky district to the district court next to be holden therein, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced. And if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a state other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending; the said adverse (party) shall give such informa-

tion, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the district court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the before mentioned case of the removal of a cause into such court by an alien; and neither party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury." (1 Stat. 79) (See 36 Stat. 1094.)

"Sec. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." (1 Stat. 82) (See 36 Stat. 1163.)

(c)

Federal Equity Rule 76.

"If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript."

(d)

Rule 23 of Eighth Circuit Court of Appeals, Par. 1.

"• • • If, at the hearing, it shall appear that any material part of the record has not been printed,

the court may make such order (including dismissal of the appeal) as may seem proper."

(e)

Rule 13, Par. 9 of Supreme Court.

"• • • If at the hearing it shall appear that any material part of the record has not been printed, the appeal may be dismissed or such order made as the circumstances may appear to the court to require."